ROBERT EMERSON EZZELL
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IN PROPRIA PERSONA

78-5290

IN THE SUPREME COURT OF THE UNITED STATES

In the matter of RICHARD DAVID EZZELL, minor.	California Supreme Court Case No. LA30774
LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS, Petitioner and Respondent, vs. ROBERT EMERSON EZZELL, natural father and parent, Citee and Appellant.	Los Angeles Superior Court Case No. A9388

On Appeal From the Supreme Court of the State of California

Jurisdictional Statement

SUBJECT INDEX

Jurisdiction

The grounds on which the jurisdiction of this court is involved are the following:

1. Pursuant to Section 1257(1) of 28 United States Code on the ground that the application and validity of the provisions of the United States Constitution providing for Counsel, Due Process and Equal Protection were drawn into question in the decision was against their validity and application herein.

2. Pursuant to Section 1257(2) of 28 United States Code on the ground that certain statutes of the State of California, California Civil Code Sections 232(a)(4) and 237.5 were drawn into question as being repugnant to the Constitution of the United States and decision herein was in favor of its validity.

The nature of the proceedings below and statute pursuant to which it was brought are the following:

On February 5, 1975, a "Petition for Freedom from Parental Custody and Control" was filed by the Los Angeles County Department of Adoptions, alleging that Richard D. Ezzell, then aged seven (7) years and four (4) months, should be declared free from the custody and control of his parents and that custody should be given to the Los Angeles County Department of Adoptions on the grounds that: (1) Richard had been left in the care of the Department of Public Social Services and others without provision for his support, without communication from his parents and with a continuous intent to abandon him, existing since September 1968; and (2) that the father, Appellant herein, was alleged to have been convicted of a felony of a nature that made him unfit to have the custody of the minor and the sentence, imposed upon the father, was for such length of time as to deprive the minor of a normal home life.

The opinion and judgment sought to be reviewed herein is dated May 30, 1978 and was entered on said date by the Supreme

Court of the State of California. A rehearing in that court was denied by Order dated June 29, 1978. Timely notice of appeal was filed with the California Supreme Court on August 21, 1978.

The jurisdiction of this court is invoked under Sections 1257(1) and 1257(2) of Title 28 of the United States Code. Cases which sustain such jurisdiction are:

At the time the petition was filed, Civil Code Section 232, Subdivision 9(a), read in pertinent part:

"An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions: . . . (4) Whose parent [is] convicted of a felony, if the felony of which such parent [was] convicted is of such nature as to prove the unfitness of such parent . . . to have future custody and control of the child, or if any term of sentence of such parent . . . is of such length that the child will be deprived of a normal home for a period of years." (Note: The underscored portion of the statute was deleted by 1976 amendment (Stats. 1976, ch. 940, Section 2).)

The other statute involved is Section 237.5 of the Civil Code of the State of California, which read as follows:

"At the beginning of the proceeding on a petition filed pursuant to this chapter, the judge shall first read the petition to the child's parents, if they are present, and may explain to the child the effect of the granting of the petition and upon request of the minor upon whose behalf the petition has been brought or upon the request of either parent the judge shall explain any term or allegation contained therein and the nature of the proceeding, its procedures, and possible consequences. The judge shall ascertain whether the minor and his parents, have been informed of the right of the minor and his parents to be represented by counsel, and if not, the judge shall advise the minor and the parents, if present, of the right of each of them to have counsel present. The court may appoint counsel to represent the minor whether or not the minor is able to afford counsel. If any parent appears and is unable to afford counsel, the court shall appoint counsel to represent each parent who appears unless such representation is knowingly and intelligently waived. The court may continue the proceeding for not to exceed 30 days, as necessary to make an appointment of counsel, or to enable counsel to acquaint himself with the case, or to determine whether the parents are unable to afford counsel at their own expense. The court may appoint private counsel or the public defender to represent the minor or the parents.

"When the court appoints private counsel to represent either the minor or the parents under the provisions of this section, such counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the real parties in interest, other than the minor, in such proportions as the court deems just. However, if the court finds that none of such real parties in interest is able to afford counsel, such amount shall be paid

out of the general fund of the county." [Emphasis added.]

A copy of the opinion of the California Supreme Court, the initial opinion by the California Court of Appeal and a later Opinion by the California Court of Appeal, together with a copy of a notice of appeal, are included in Appendix "A" hereto.

Questions Presented

I Whether Section 232(a)(4) of the California Civil Code is Unconstitutional on its face, as construed and as applied herein as violating the Equal Protection Clause and the Due Process Clause in the Fourteenth Amendment to the United States Constitution.

II Whether reversal is required by Appellant's constitutional rights to Due Process and Equal Protection where the California State Legislature during the pendency of the appeal expressly deleted length of a parents confinement as a ground for severance of parental rights under Section 232(a)(4) of the Civil Code.

III Whether Civil Code Section 237.7 violates the constitutional provisions for Counsel, Due Process and Equal Protection as construed and applied in not requiring appointment of counsel for a minor in a proceeding for severance of the parent/child relationship where the child was concealed and not brought into court, the probation report did not inquire into the child's wishes and did not provide any sociological or psychological background information on the child, the father and their relationship and the effect of severance thereof.

IV Whether Appellant was denied his constitutional right to counsel, where his court appointed counsel failed to insure that the whereabouts of the child was disclosed to court and counsel and that the minor was present in court and failed to insure that such a complete probation report was before the court.

Statement of the Case

Robert E. Ezzell appealed from a Los Angeles Superior Court judgment declaring that custody and control of his minor son, Richard, should be removed from the minor's parents and placed in plaintiff Los Angeles County Department of Adoptions ("County"). (See California Civil Code, Section 232, subd. (a)(4).) The California Supreme Court affirmed the judgment after the California District Court of Appeals had reversed it in two opinions.

County seeks to free Richard from custody and control of his parents on grounds (1) the minor, 7-1/2 years of age when the petition was filed, had been almost since birth provided for by public agencies, without support or communication from parents who intended to abandon him, and (2) the father had been convicted of a felony which not only made him unfit to have custody of the minor but also required his confinement for such length of time as to deprive the minor of a normal home life. The father (Robert) seeks relief from the judgment based as to him on the finding that "no reasonable possibility" existed "that the father would be releaed from prison soon enough to embark upon a meaningful parental relationship." (California Civil Code, Section 232, subd. (a)(4).)

The father, Appellant, has maintained strong relationships with at least three of his sons, and had actively attempted to reunite his family prior to his arrest in August, 1974 for bank robbery. At the trial proceeding, his three older sons testified and indicated their strong desire to maintain the family unit to the extent this was possible. The three sons and the father testified to several visits by the father with Richard and a close relationship. While he was incarcerated, Appellant had also regularly corresponded with Richard.

Richard was not present at the hearing. Moreover, two (2) months before the hearing he was apparently moved from the

foster home where he had resided since 1969. His brothers were unable to contact him. It further appeared from remarks by the court that the Los Angeles County Department of Adoptions had prevented Appellant from seeing Richard after his arrest in August, 1974. Appellant's attorney was not able to interview Richard prior to the hearing.

The Los Angeles County Department of Adoptions, who petitioned pursuant to Civil Code Section 232 et seq. to terminate Appellant's parental rights, presented as evidence only the minor's birth certificate, the judgment of Appellant's conviction and sentence, and a five (5) page probation report. The preparer of the probation report had not interviewed either Richard or his father, but apparently had merely compiled the report from the files of various county agencies and the federal Bureau of Prisions. The report contained no social study, no psychological evaluation of Richard, nor any prognosis for his development under alternate dispositions. (Compare, In re Marcos, 73 Cal.App.3d 768, 775 (1977).) It contained a short summary of the minor's history and his parents' contacts with him, and it concluded, "The minor has made a good adjustment in his present foster home where he as responded to the security, love and warmth of the foster parents." As of the date of the hearing, however, the minor had apparently been removed from that home. There was conflicting evidence whether the foster parents wished to adopt Richard or whether termination would result in a change of placement. The record is otherwise devoid of any psychological data on Richard, of any evidence of his feelings about his father or his possible preferences regarding his future. Richard was two (2) week short of eight years old at the time of the hearing.

Several months before the hearing, Appellant petitioned the court for appointment of an attorney for himself and for his son. The court's minute order of May 21, 1975, ordered counsel

appointed for Appellant, but no reference was made to counsel for the minor.

Although the court found that Appellant had not intended to abandon Richard, [California Civil Code Section 232(a)(1)], it held that the term to which Appellant had been sentenced would render it improbable that he could establish a meaninful parental relationship with Richard. [California Civil Code Section 232(a)(4)]. This appeal followed. During the pendency of this appeal, the Legislature deleted as a ground for severance of parental rights the length of a parent's confinement. [California Civil Code Section 232(a)(4)].

From decision in the Los Angeles Superior Court, an appeal was taken to the Court of Appeal for the State of California. Appellant contended that Section 232(a)(4) was unconstitutional on its face, as applied and as construed as set forth below.

Civil Code Section 232(a)(4) clause 2 violated the Equal Protection Clause of the Fourteenth Amendment because the declared purpose of the statute, stability and security, which may be a compelling state interest sufficient to justify an invasion of a fundamental individual interest, need not be proven to sever parental control under this section.

Parental control and custody of children has been recognized as a fundamental or essential interest. Meyer v. Nebraska, 262 U.S.390, 67 L.Ed.1042, 43 S.C. 625 (1923); Stanley v. Illinois, 405 U.S.645, 92 S.Ct.1208, 31 L.Ed. 551 (1972); Lois R. v. Superior Court, 19 Cal.App.3d 895, 97 Cal.Rptr.158 (1971); In re B.G., 144 Cal.Rptr. 444, 523 P.2d 244 (1974). Classification of an interest as fundamental invokes strict scrutiny of a statute which limits that interest.

"A classification that discriminates with respect to a right of very great importance is not to be sustained

merely because the state fails to supply a substantial justification, its discrimination is invideous and unconstitutional." Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

The United States Supreme Court in Stanley said,

"We observe that the state registers no claim towards its declared goals when it separates children from the custody of fit parents." 402 U.S. at 652.

The clear inference is that a state may not have a compelling or substantial interest if it does not show that parent is unfit. As indicated above, the 1969 Family Law Act changed the requirements for terminating parental control and custody. Now the petitioner must only show that continued parental control would be detrimental. It is a reduced burden of proof because this requirement is different from unfitness, the new requirement does not have the approval of the United States Supreme Court.

The declared purpose of Section 232 is to extend adoptive services to children living in a foster home,

". . . so that these children may be placed in adoptive homes where they will have the benefits of stability and security." (Stats.1970, Ch.853. Section 1, p. 1160)

The situation described in Section 232(a)(4) clause 2 is a felony conviction and a lengthy incarceration. The proof of these two factors is not identical to and arguably not relevant to the declared purpose of Section 232. A parent absent from the home for a period of years, may be able to provide control, adequate care, stability, and security to a child in that home. Two examples may illuminate this point.

First, the father who is in the military may be absent from his home for a lengthy period because he is assigned to a foreign country and cannot take his family. This is not a situa-

tion where the state would want to take the children away. Arguably the father could provide control, guidance, security and stability by long distance communication and occasional vists. To distinguish this example from the current case on the basis of felony conviction is to make the termination of parental control a punishment. See, Trop v. Dulles, 356 U.S. 86, 78 S.Ct., 590, 3 L.Ed.2d 630 (1958). The statute would be penal and constitute cruel and unusual punishment because of the nature of the sanction and the existence of a prior sanction for the same act.

A second example is the father who is convicted of a felony but has money. Examples of this would be the "Watergate defendants." Such a parent can move the children close to the institution where he is serving his time, provide living expenses by means of trusts, and maintain daily visitation and correspondence. Again, this is a person the state probably would have no interest in depriving him of his children. This is very close to what Mr. Ezzell wants to do. The only distinction is his inability to provide the money to do it. To draw a distinction based on wealth may be suspect. Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.169 (1966).

The point of this extended discussion has been to demonstrate that a parent convicted of a felony with a long absence from the home does not of itself demonstrate lack of stability and security. If the person's ability to provide that stability and security is not considered, then the state is not relying on the declared purpose of the statute. If the purpose of the statute is not relied on, then the state cannot claim a compelling interest sufficient to justify an invasion into fundamental individual rights.

The other sections of Section 232 with the exception of Section (a)(2)--person cruelly treated or neglected by parents--require proof that the parent is unable to control the child. As

a result, we submit the classification that is drawn has no rational relationship to the purpose of the statute and constitutes invideous discrimiration.

Section 232(a)(4) clause 2 creates an irrebuttable presumption because it says all felons with a lengthy term can be deprived of their children. It is unconstitutional because it does not allow an individual determination of whether parental control is detrimental and not in the best interests of the child as is required by the Due Process Clause of the Fourteenth Amendment.

Recently conclusive presumptions have come under attack by the U.S. Supreme Court. In distinguishing between residents and nonresidentes for tuition purposes, Justice Stewart speaking for the majority in Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) staed that the state could not

> "deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state has a reasonable alternative means of making the crucial determinations. Rather, standards of due process require that the state allow such an individual the opportunity to present evidence that he is a bona fide resident entitled to the instate rates."

See, Dept. of Agriculture v. Murry, 413 U.S. 528 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 38 (1974). Stanley v. Illinois, supra, on the basis of an improper conclusive presumption held an unwed father could not be permanently separated from his children simply on proof that he was not married. A hearing on the issue of unfitness was required even though unmarried fathers were seldom fit to be a parent.

The Stanley and Vlandis approach has a direct parallel in the present case. The two (2) criteria of Section 232(a)(4) clause 2 are conviction of a felony and a lengthy sentence. The declared state interest being protected is the welfare of the child. A person absent from the home may be able to control the child and maintain a meaningful parental contact with the child. This is directly relevant to a finding of the best interests of the child and of detriment to the child.

In addition, several states have taken the position that

> "Imprisonment, per se, however is insufficient to justify an order of permanent deprivation." In Re Sego, 7 Wash.App. 457, 499 P.2d 888 (1972) rehearing 513 P.2d 831.

See, In re Staat, 287 Minn.501, 778 NW 2d 709 (1970); Jordan v. Hanncock (Texas) 508 S.W.2d 878 (1974); Diernfield v. People (Colo.) 323 P.2d 638 (1958). Although most of these cases approach the issue with an abandonment statute, Section 232(a)(4) is not very different from abandonment. There, as here, the single most important fact is that the consequences of imprisonment is an inability to be in the home.

The lower court defined its standard as follows:

> "The only thing that the court has got to consider is whether there is any reasonable probability that he will be released at some time soon enough to embark upon a meaningful parental position in respect to Richard and that probability is totally non-existant, it really is." P.111 Reporter's Transcript.

Quite clearly the only relevant consideration employed by the court was whether Mr. Ezzell or not had a long sentence. A meaningful parental position could begin only after he was released since the court did not consider what control and contribution Mr. Ezzell has and will make to the control, stability and security of

his children, the decision was made without regard to the very factor that the state deemed fundamental. See, Bell v. Burson, 402 U.S.535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), which held such a decision invalid.

Proof that Mr. Ezzell could stand in a meaningful parental position is found in the words of the lower court. When considering the proposed move of the three older boys to Washington so that they could visit Mr. Ezzell at McNeil Island Federal Penitentiary the court observed that it would be sensible because they need that

> ". . .--to continue in the meaningful development they have had." p.112 Reporter's Transcript.

Such a comment strongly suggets that the parent will contribute to their meaningful development. It implies Mr. Ezzell is providing some meaningful parental guidance and control--promoting the welfare of the children. If he can do this for the three older children, he can do it for the fourth child also. The three older children are living proof of his ability to communicate and control while absent from the home. Their superior character and behavior are proof that he has the ability to promote the welfare of his chidren. The state had a reasonable alternative means to make this crucial determination. It could have interviewed Richard to determine the strength of his family ties and his ability to respond to long distance control with occasional visits. For these reason, the presumption created by the state is not permissible.

Appellant's further arguments in the appeal included contentions that he was denied his constitutional right to effective and adequate counsel, and that Section 237.5 of the Civil Code required appointment of counsel for the minor. In the initial opinion by Court of Appeal, in Appendix "A" hereto, the court rejected those arguments but accepted another argument made by

Appellant, that the finding of the trial court was inadequate because it failed to include an express finding that the award of custody to the parent would be detrimental to the child and the award to a non-parent would be required in the best interests of the child. The case was reversed in the initial opinion by the Court of Appeal so that the trial court could consider and make appropriate findings.

The Court of Appeal granted rehearing in view of a then recent State Court Opinion requiring appointment of counsel for a minor in proceedings such as this. At rehearing Appellant contended that, due to what would otherwise be a violation of the minor's constitutional rights to Counsel, Due Process and Equal Protection, appointment of an attorney for the minor was required and indeed was provided for under Section 237.5 of the Civil Code. In a later opinion, attached hereto in Appendix "A", the Court of Appeal reversed the trial court judgment on the ground previously stated, that the findings were inadequate, and further reversed on the additional ground that the court's failure to appoint counsel for the minor constituted reversable error. The cause was remanded for retrial. In the second opinion, the Court of Appeal again rejected Appellant's argument that the statute in question was unconstitutional.

Respondent filed a petition for hearing with the California State Supreme Court. The State Supreme Court granted the hearing, set the matter for oral argument, and rendered its decision dated May 30, 1978, which only expressly dealt with the issue of whether counsel should have been appointed. The court in a four to three decision with the Chief Justice of the Court, Honorable Rose Bird, writing an extensive dissenting opinion, affirmed the judgment of the Superior Court holding that appointment of cousel was not required for the minor. Petition for rehearing was filed by Appellant in the State Supreme Court com-

harmless. I simply cannot join such reasoning."

Appellant's contentions are particularly important in a case such as this, where the child was secreated from the court and his father prior to hearing, the child was not present at hearing for conference and questioning by the court and others, where the probation report presented as the sole evidence by the county contained no interview with the child, the father, inquiry into the child's wishes, sociological, psychological and other studies dealing with what would be in the best interests for the child as far as custody and the impact on the child of severance of the relationship between child and son. Appellant's other three sons, testified at the hearing, turned out well and were bright, good students. The court's action will sever this minor's relationship with his brothers, as well as the father.

In Quilloin v. Walcott, 46 Law Week 4055 (January 10, 1978), the United States Supreme Court stated:

> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972); Stanley v. Illinois, supra; Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974).
>
> "We have little doubt that the Due Process Clause

> would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' Smith v. Organization of Foster Families for Equality and Reform, --- U.S. ---, --- (1977) (Stewart, J., concurring)." Id. at 4057.

As recenty stated by this court in Smith v. Organization of Foster Families, 431, U.S. 816, 53 L.Ed.2d 14, 97 S.Ct. 2094 (1977),

> "It is, of course, true that 'freedom of personal choice in matters of . . .family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640, 39 L.Ed.2d 52, 94 S.Ct. 791, 67 Ohio Ops.2d 126 (1974). There does exist a 'private realm of family life which the state cannot enter,' Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 64 S.Ct. 438 (1944), that has been afforded both substantive and procedural protection. Id. at 842, 53 L.Ed.2d at 33, 97 S.Ct. at 2125.

This court in the Smith case noted with approval two safeguards in the Smith proceeding which were not present here, appointment of counsel for the minor, and determination and taking into account the minor's wishes. Id. at 821 & 852, 53 L.Ed.2d at 20-21 & 40, 97 S.Ct. at _____.

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Conclusion

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted and that the judgment complained of should and must be reversed.

Respectfully submitted,

ROBERT EMERSON EZZELL

By _____
RICHARD J. STALL, JR.,
Attorney

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

RICHARD E., a minor.

LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS,

Plaintiff and Respondent,

v.

ROBERT E.,

Defendant and Appellant.

L.A. 30774

Super. Ct. No. A9388

Robert E. appeals from judgment declaring that custody and control of his minor son, Richard, should be removed from the minor's parents and placed in plaintiff Los Angeles County Department of Adoptions (County). (See Civ. Code, § 232, subd. (a)(4).)[1/] We affirm the judgment.

County seeks to free Richard from custody and

1/ The record on appeal fails to disclose that judgment was entered herein, but examination of the trial court record pursuant to California Rules of Court, rule 12(a), demonstrates judgment was entered on 18 September 1975. Robert E. has a right to appeal from that judgment. (Code Civ. Proc., §§ 902, 904.1.)

1 after page 12 hereof
(SEE DISSENTING OPINION)

Appendix "A1"

Appendix A1

control of his parents on grounds (1) the minor, 7-1/2 years of age when the petition was filed, had been almost since birth provided for by public agencies, without support or communication from parents who intended to abandon him, and (2) the father had been convicted of a felony which not only made him unfit to have custody of the minor but also required his confinement for such length of time as to deprive the minor of a normal home life.[2/] Only the father (Robert) seeks relief from the judgment based as to him on the finding that "no reasonable possibility" existed "that the father would be released from prison soon enough to embark upon a meaningful parental relationship." (Civ. Code, § 232, subd. (a)(4).)

The mother, whose whereabouts are unknown but who was served by publication, has not appeared in these proceedings. The court found that she intended to abandon the

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2/ At the time the petition was filed, Civil Code section 232, subdivision (a), read in pertinent part: "An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions: . . . (4) Whose parent [is] convicted of a felony, if the felony of which such parent [was] convicted is of such nature as to prove the unfitness of such parent . . . to have future custody and control of the child, or if any term of sentence of such parent . . . is of such length that the child will be deprived of a normal home for a period of years." (Note: The underscored portion of the statute was deleted by 1976 amendment (Stats. 1976, ch. 940, § 2).)

minor (Civ. Code, § 232, subd. (a)(1)), and granted the petition as to her also.

Robert was born in Missouri in 1939. He has, in addition to Richard, other sons aged 16, 15 and 13 years at the time the petition was filed. They reside in foster homes. Speaking of his relationship with his children he states: "I happen to be that 'one in a million type of natural father' that I love my sons to the extent that I will effect any means or actions at my disposal for the betterment of their welfare regardless of the consequences to myself personally."

Robert has not chosen the most laudable means to better the welfare of his children. In June 1967 he was convicted of armed bank robbery and sentenced to 20 years confinement in a federal prison. While on parole in 1968, he was arrested and convicted of second degree burglary. In August 1974, again on parole, he was arrested for bank robbery, and in November 1974 he was sentenced in federal court upon multiple convictions to a term of at least 25 years.

Richard was born in September 1967 while appellant was in prison following first conviction. Since placed in a foster home when three years old, Richard has never seen his mother or father with the exception of three visits by

Robert in the spring of 1974. Neither parent has contributed to his support. Robert, who was represented by appointed counsel at hearing on the petition, contends the judgment must be reversed because the court failed to also appoint counsel for Richard, citing In re Dunlap (1976) 62 Cal.App. 3d 428.

Dunlap involved a custody and control proceeding for the 14th child of Juanita Dunlap, a 43-year-old widow. At the time of birth Juanita refused to reveal the name of the baby's father and voluntarily relinquished the child to a foster home because she had then "about nine" children living at home, was under a strain, and feared the baby would not be accepted by the other children. When the child was three years of age Juanita sought to remove her from the foster parents. They petitioned pursuant to Civil Code section 232 to free the child from Juanita's care and custody. A probation report (see Civ. Code, § 233) made a strong recommendation in favor of the foster parents as being in the best interest of the child. For unexplained reasons the report was not received in evidence.

The Dunlap trial court found on conflicting evidence Juanita had never intended to abandon the baby and ordered she be delivered to Juanita "forthwith." In reversing, the Court of Appeal expressed concern that neither the

petitioner nor a parent had advocated a position necessarily based in any part on the minor's best interests. Noting the probation report had not been received in evidence, the court concluded the minor's interests had not been adequately protected, holding there to be reversible error in the failure to appoint independent counsel for the minor pursuant to Civil Code section 237.5.

Civil Code section 237.5 provides procedures for hearing on a petition to free a child from parental custody and control. It states the judge "shall" read the petition to the child's parents, if they are present; the judge "shall" explain any term or allegation contained in the petition, the nature of the proceeding, its procedures, and possible consequences, upon request by the minor or either parent; the judge "shall" ascertain whether the minor and parents have been advised of the right to be represented by counsel, and advise them of such if they were unaware; the judge "shall" appoint counsel to represent each parent who appears and is unable to afford counsel; and the judge "may" appoint an attorney to represent the minor whether or not he is able to afford counsel.

When the Legislature has, as here, used both "shall" and "may" in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and

discretionary meanings, respectively. The ordinary import of "may" is a grant of discretion. (Housing Authority v. Superior Court (1941) 18 Cal.2d 336, 337.) An exercise of such discretion will not be disturbed on review unless abused. (6 Witkin, Cal. Procedure (2d ed. 1971) p. 4234.) Even failure to state reasons for a discretionary decision does not constitute, by itself, abuse of discretion. (People v. Edwards (1976) 18 Cal.3d 796, 799.) Further, to be entitled to relief on appeal from an alleged abuse of discretion, it must clearly appear the resulting injury is sufficiently grave to manifest a miscarriage of justice. (Brown v. Newby (1940) 39 Cal.App.2d 615, 618.)

A proceeding to free a child from parental custody and control is essentially accusatory in nature, directed to challenges against the parent--not against the child. (In re Rodriguez (1973) 34 Cal.App.3d 510, 514.) The petitioner must establish that a parent is guilty of abandoning, cruelly treating or neglecting the child; or is addicted, morally depraved; or is a convicted felon, is mentally deficient, or is otherwise incapable of caring for the child. (Civ. Code, § 232.) Thus, the issue at a hearing is whether a parent is fit to raise the child. To that end are directed all the arguments of opposing parties, parents claiming they are fit and petitioners claiming otherwise, and with each

side generally contending it is protecting the best interests of the child. It is thus likely that in a particular case the court will be fully advised of matters affecting the minor's best interests, and little assistance may be expected from independent counsel for the minor in furtherance of his client's or the court's interests. However, when the court finds a child has separate interests not protected in the contest between parents and a petitioner, the court must exercise its discretion by appointing separate counsel.

In confronting the particular circumstances in Dunlap the court concluded the minor's interests were prejudiced because she had not been represented. It was recognized that while the court possesses broad discretion in the matter (In re Dunlap, supra, 62 Cal.App.3d 428, 438), appointment of counsel is nevertheless required in the absence of an affirmative showing the minor's interests would otherwise be protected. (Id.)

Thus, in absence of a showing on the issue of the need for independent counsel for a minor, failure to appoint constitutes error. However, this is not to say a court must always exercise its discretion in favor of appointing counsel. The court possesses broad discretion in determining need for counsel, and exercise of discretion will not

be disturbed on appeal except for manifest abuse. But here no showing on the issue of need for counsel was made, and thus no basis upon which the court could exercise its discretion not to appoint counsel existed. Failure to appoint counsel in such circumstances is error. (In re Dunlap, supra, 62 Cal.App.3d 428, 438.) The rule we adopt of course requires counsel be appointed at the commencement of proceedings absent an immediate showing upon which the court can exercise its discretion against making an appointment.

Failure to appoint counsel in the context of a freedom from parental custody and control proceeding is dissimilar to denial of the fundamental right to counsel where one is charged with crime or juvenile misconduct. (See In re Robinson (1970) 8 Cal.App.3d 783, 786.) None of the personal deprivations flowing from denial of counsel in juvenile court proceedings are present here. (See In re Winship (1970) 397 U.S. 358; In re Gault (1967) 387 U.S. 358.) Accordingly, failure to appoint counsel for a minor in a freedom from parental custody and control proceeding does not require reversal of the judgment in the absence of miscarriage of justice. (See Brown v. Newby, supra, 39 Cal.App.2d 615, 618.)

There is nothing in the record of the instant proceeding suggesting the minor was prejudiced because he

was not represented by independent counsel. The court concluded on substantial evidence in accordance with the probation report that awarding custody to either parent would be detrimental to Richard. On the other hand, Robert was afforded full opportunity to demonstrate that his continuing custody of Richard would be in Richard's best interests. He testified, conceding his criminal violations but expressing his love and devotion for Richard. Each of his other sons--all living in foster homes for several years--also testified in a manner very favorable to Robert.[3/]

The record discloses and Robert suggests nothing which independent counsel for the minor might have done to better protect Richard's interests. The court made its judgment with full knowledge of family relationships affecting Robert and Richard, noting particularly the very favorable manner in which Robert's other children had developed notwithstanding his long absence from the family. It thus appears

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3/ The trial court commented on Robert's sons as follows: "I don't think I have ever experienced three minors of age thirteen, fifteen and sixteen that were such outstanding witnesses, such intelligent persons. Not only did they indicate their deep devotion to their father, but they are very bright . . . I am sorry to say that half of the attorneys that come into this courtroom cannot communicate as well as these three children can."

the court had before it all factual matters which may have persuaded it that Richard's interests would be best served by not depriving Robert of custody.[4/] In such circumstances, no miscarriage of justice resulted from the court's failure to exercise its discretion to appoint counsel for Richard.[5/]

Robert further complains the trial court failed to make findings required by Civil Code section 4600.[6/] (See In re B.G. (1974) 11 Cal.3d 679.) Robert did not request the court make findings of fact (see Code Civ. Proc., § 632), and the court made no express finding or conclusion. However,

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4/ We do not imply that the favorable impression created by Robert's older children was necessarily a factor to be weighed in favor of continuing Robert's custody of Richard. After all, the older children were all in large part the products of the foster home program.

5/ In Dunlap, supra, 62 Cal.App.3d 428, the court reversed judgment without expressly considering the question of a miscarriage of justice. To the extent that Dunlap suggests a per se rule that reversal automatically follows from failure of the trial court to exercise its discretion, it is disapproved. However, there are circumstances in that case, primarily the failure to place in evidence the probation report, suggesting failure to appoint independent counsel for the minor may have resulted in a miscarriage of justice.

6/ Section 4600 provides in pertinent part: "In any proceeding where there is at issue the custody of a minor child . . . . [¶] Before the court makes any order awarding custody to a person or persons other than a parent . . . it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child . . . ."

after all evidence had been received the court stated: "The court does not have to conclude that [Robert] is going to be in jail for thirty-five years or even twenty-five years. [The aggregate length of multiple federal terms imposed on Robert is in dispute.] The only thing that the court has got to consider is whether there is any reasonable probability that he will be released at some time soon enough to embark upon a meaningful parental position in respect to Richard, and that probability is totally nonexistent, it really is." (Italics added.) While the court's statement does not comply with the literal requirements of Civil Code section 4600 (see In re B.G., supra, 11 Cal.3d 679, 698-699), in rendering its judgment the court further recited: " . . . the court having found that an award of custody of [Richard E.], minor, to said citees, or either of them, would be detrimental to said minor and that an award of custody to a non-parent is required to serve the best interests and welfare of said minor . . . ."

We deem the court's statements to constitute a finding that, by reason of Robert's incarceration, he is unfit to provide future custody and control of Richard, and Richard would be deprived of a normal home for a period of years, within the meaning of Civil Code section 232, subdivision (a)(4). The court's statements otherwise constitute

compliance with Civil Code section 4600. That section does not specify any particular form for findings. (See Hopkins v. Warner (1895) 109 Cal. 133, 139; Guardianship of Sharp (1940) 41 Cal.App.2d 79, 84.)

The judgment is affirmed.

CLARK, J.

WE CONCUR:

MOSK, J.
RICHARDSON, J.
MANUEL, J.

See Next page for dissent.

C O P Y

IN THE MATTER OF RICHARD E.

L.A. 30774

DISSENTING OPINION BY BIRD, C.J.

I respectfully dissent.

In the realm of human relationships few are more fundamental than that between father and son. Today, this court is upholding the legitimacy of a proceeding in which this unique relationship was irrevocably severed despite the fact that the trial court failed to appoint counsel for the son, failed to ascertain his wishes, and based its decision on grounds that have subsequently been held to be insufficient by the Legislature. I cannot sanction such a result.

The termination of parental custody and control is a drastic measure which results in (1) severing all legal relationships between parent and child; (2) appointing a legal guardian in place of the parent; (3) placing the child for adoption; (4) cutting off all communication and contact between parent and child; and (5) imposing a binding, unmodifiable order on both parent and child. Despite these irrevocable consequences, the majority

conclude that the error committed in the trial proceeding was harmless. I simply cannot join such reasoning.

I

The facts of this case are unusual. The father, appellant, has maintained strong relationships with at least three of his sons,[1/] and had actively attempted to reunite his family prior to his arrest in August 1974 for bank robbery. At the trial proceeding, his three older sons testified and indicated their strong desire to maintain the family unit to the extent this was possible. There was conflicting testimony regarding the extent of contact between appellant and his son, Richard. The three sons and the father testified to several visits at which Richard was present. While he was incarcerated, appellant had also regularly corresponded with Richard.

Richard was not present at the hearing. Moreover, two months before the hearing he was apparently moved from the foster home where he had resided since 1969. His brothers were unable to contact him. It further appeared from remarks by the court that the Los Angeles County Department of Adoptions had prevented appellant from seeing Richard after his arrest in August 1974. Appellant's attorney was not able to interview Richard prior to the hearing.

1/ Only Richard's status was at issue in the hearing. The County Department of Adoptions did not seek to free the three older sons from their father's custody and control.

The Los Angeles County Department of Adoptions, who petitioned pursuant to Civil Code section 232 et seq. to terminate appellant's parental rights, presented as evidence only the minor's birth certificate, the judgment of appellant's conviction and sentence, and a five page probation report. The preparer of the probation report had not interviewed either Richard or his father, but apparently compiled the report from the files of various county agencies and the federal Bureau of Prisons. The report contained no social study, no psychological evaluation of Richard, nor any prognosis for his development under alternate dispositions. (Compare In re Marcos S. (1977) 73 Cal.App.3d 768, 775.) It contained a short summary of the minor's history and his parents' contacts with him, and it concluded, "The minor has made a good adjustment in his present foster home where he has responded to the security, love and warmth of the foster parents." As of the date of the hearing, however, he had apparently been removed from that home. There was conflicting evidence whether the foster parents wished to adopt Richard or whether termination would result in a change of placement. The record is otherwise devoid of any psychological data on Richard, of any evidence of his feelings about his father, or his possible preferences regarding his future. Richard was two weeks short of eight years old at the time of the hearing.

Several months before the hearing, appellant petitioned the court for appointment of an attorney for himself and for his son. The court's minute order of May 21, 1975, ordered counsel appointed for appellant, but no reference was made to counsel for the minor.

Although the court found that appellant had not intended to abandon Richard, (Civ. Code, § 232(a)(1)), it held that the term to which appellant had been sentenced would render it improbable that he could establish a meaningful parental relationship with Richard. (Civ. Code, § 232(a)(4).) This appeal followed. During the pendency of this appeal, the Legislature deleted as a ground for termination of parental rights the length of a parent's confinement. (Civ. Code, § 232(a)(4).)

II

Civil Code section 232 et seq. provide a procedure for removing a minor child from the custody and control of the natural parents, thereby freeing the child for adoption. As the majority point out, a section 232 proceeding is in large part accusatory in nature, directed at establishing that the natural parent is, for one of the reasons enumerated in that statute, incapable of caring for the child. Because of the "drastic remedy" of complete severance of the parent-child bond (In re T.M.R. (1974) 41 Cal.App.3d 694, 703), the

Legislature has provided procedural safeguards in section 232 proceedings, including the right to appointed counsel for indigent parents. (Civ. Code, § 237.5.)

The thrust of section 232 proceedings, however, is to provide for the welfare of the child, not to punish the parents. (Civ. Code, § 232.5.) Thus, Civil Code section 237.5 also provides for court-appointed counsel for the minor. The Court of Appeal in In re Dunlap (1976) 62 Cal.App.3d 428, 438, concluded that the statutory scheme providing for termination of parental rights, when viewed as a whole, indicated a legislative intent that counsel be appointed for the minor unless the circumstances indicate that the child's interests would be otherwise protected. Noting that in the adversary setting of a section 232 proceeding it is often difficult for the interests of a child to be clearly and impartially articulated, the court stated: "The Legislature's recognition of the rights of personality of the child as the touchstone of proceedings to free him from parental custody and control is evidenced by its mandate in Civil Code section 232.5 that the statutory scheme 'be liberally construed to serve and protect the interests and welfare of the child.' The Legislature's recognition of the importance of the proceedings to the child is shown by its enactment of Civil Code section 238 providing that the results of the action

are conclusively binding upon the child. The Legislature's recognition of the significance of counsel to the protection of the child is disclosed by the reference in Civil Code section 237.5 to the child's 'right' to counsel.

"(2b) Liberal construction of Civil Code section 232 et seq. to serve and protect the interests and welfare of the child requires that the burden of persuasion with respect to the trial court's determination to appoint or deny the child independent counsel be placed upon justifying the decision to deny counsel. Unless the burden is allocated in that fashion, there may well be no one involved, except in an adversary position, in the proceedings to assert the right of a child too young to assert it for himself. If the right is not asserted, the child's right of personality, recognized as the primary consideration of the process, may be determined without the protection of counsel uninfluenced by his advocate's duty to another party." (Id., at 439, emphasis added.)

The majority opinion correctly analyzes Dunlap as holding that "appointment of counsel is nevertheless required in the absence of an affirmative showing the minor's interests would otherwise be protected." (Maj. opn., ante, at p.____*.) The majority then conclude that it was error under these

* Multilith opinion at page 7.

circumstances not to appoint counsel for Richard. (Maj. opn., ante, at p.____*.) However, it goes on to hold that failure to appoint counsel for Richard is not reversible per se. The majority conclude that no prejudicial error occurred in this case because (1) appellant was afforded a full opportunity to persuade the trial court that continuation of his parental rights was in Richard's best interest, and (2) there was nothing further that independent counsel could have done to protect Richard's interests.

However, the fact that appellant was given the opportunity to present his case does not address the fact that Richard's interests were not protected. The majority ignore the careful analysis in Dunlap of both the legislative intent behind section 237.5 and the practical difficulties in ascertaining a child's separate interests.[2/] The Dunlap court recognized the importance of the proceedings to the child, and the danger in relying on the adversary process to ascertain a child's separate interests. To protect the child, the court placed the burden of proof "upon [the one] justifying the decision to deny counsel." (In re Dunlap, supra, 62 Cal.

2/ Respondent stated at oral argument that it is the duty of the probation officer to conduct an investigation and articulate the interests of the child. (Civ. Code, § 233.) This case illustrates the inadequacy of that argument. (See also In re Dunlap, supra, 62 Cal.App.3d 428, 440, fn. 3.)

* Multilith opinion at page 8.

App.3d 428, 439.) Thus, the Dunlap court implicitly recognized that it cannot be presumed that adverse parties in a custody proceeding willfully and adequately advise the court regarding the minor's best interests.[3/]

Further, the majority has ignored the state of the record in this case. The trial court was impressed with the quality of testimony from Richard's three older brothers, the regard they had for their father and their interest in keeping the family together. The court was troubled by the prospect of separating the family. Yet the court had no evidence regarding Richard's attachment to his brothers or father when it made its decision. Absent any psychological information regarding Richard, the trial court was forced to speculate that "maybe Richard is not as strong as his brothers." In this highly unusual case, this court can only speculate as to what counsel for Richard might have contributed. At the minimum, appointed counsel could have interviewed Richard and ascertained his feelings toward his brothers and his father and discussed

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3/ The problem may be especially difficult where, as here, the child is not present in court. Civil Code section 234 states that the child must be present if over the age of 12. If under 12, however, the child is to be present only "upon order of the court after necessity being shown." The record does not show that anyone requested Richard's presence in court.

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* Multilith opinion at page 7.

his future. This information could have been conveyed to the court. Finally, counsel could have supplemented the sketchy probation report.[4/]

It is possible that Richard had not formed any strong attachment to his father. However, it is also possible that he or his appointed counsel might have presented testimony favorable to maintaining his relationship to his father. The failure to appoint counsel is presumptively error, as the majority recognize. On the basis of this record, how can this court speculate and conclude that failure to appoint counsel was not prejudicial to Richard or to his father?

III

The failure to appoint counsel for Richard was compounded by the failure to comply with Civil Code section 4600. This court held in In re B.G. (1974) 11 Cal.3d 679, 696, that Civil Code section 4600 applies in any proceeding in which child custody is an issue. That section states, "If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court

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4/ On the desirability of appointing counsel for children in adoption-related proceedings and the role such counsel might play, see Bodenheimer, New Trends and Requirements in Adoption Law and Proposals for Legislative Change (1975) 49 So.Cal.L.R. 10, 98-102, and sources cited therein.

shall consider and give due weight to his wishes in making an award of custody or modification thereof." (Emphasis added.) That section further requires that an award of custody to a nonparent may only be made following a finding that "an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child."

Section 4600 has been held applicable in section 232 proceedings (In re T.M.R., supra, 41 Cal.App.3d 694, 704; see In re Rose G. (1976) 57 Cal.App.3d 406, 417), and the majority appear to hold it is applicable here. (Maj. opn., ante, at p.____*.) Indeed, the trial judge in the instant case was aware of its applicability. Section 4600 does not require that the wishes of a child of tender years be automatically adopted. What it does require is that in a decision as important as permanent custody, the personality of the individual child be taken into account with his wishes ascertained if possible. (See generally, Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights (1976) 28 Stan.L.Rev. 623, 696-697.) This evidence may then be accorded "due weight" along with the other evidence adduced at the hearing. In the present

* Multilith opinion at pages 10-11.

case, nothing in the record indicates that anyone ever attempted to interview Richard prior to the proceedings to ascertain his wishes in this matter.

This court need not determine at what age a minor's wishes must be ascertained. But if there is no information at all in the record regarding the personality or possible preferences of a child of nearly eight years, the court has failed to comply with section 4600. Further, without this information, it was impossible for the trial court to ascertain whether termination was necessarily in Richard's best interests or whether it could prove detrimental to him. In view of the testimony of his brothers, such evidence would have been critical.

Furthermore, in a proceeding to terminate parental rights, section 4600 requires a finding that custody in a parent would be detrimental to the child and custody in a nonparent would be necessary to further the child's best interests. (In re T.M.R., supra, 41 Cal.App.3d 694, 703-704.) This court in In re B.G., supra, 11 Cal.3d 679, 698-699, stated: "[W]e conclude that section 4600 permits the . . . court to award custody to a nonparent against the claim of a parent only upon a clear showing that such award is essential to avert harm to the child. A finding that such an award will promote the 'best interests' or the

'welfare' of the child will not suffice." In the present case the trial judge failed to make the required finding.

The majority deem this omission corrected by the court's statement and subsequent order. (Maj. opn., ante, at p.____*.) The order was prepared by counsel for the County Department of Adoptions. It does not contain specific findings based on the evidence in this case, but merely recites the language of section 4600. As the court noted in In re Rose G., supra, 57 Cal.App.3d 406, 416, basic fairness, as well as adequate appellate review, requires written findings at trial. (See also In re John H., 21 Cal. 3d 18, 34-36, dis. opn., by Bird, C.J..) In custody proceedings involving minor children, it is inappropriate for an appellate court to imply a missing finding even if supported by evidence in the trial record. (In re Rose G., supra, 57 Cal.App.3d 406, 417-418.)

IV

Finally, it should be noted that the trial court specifically found in appellant's favor on the issue of abandonment. The court based its adverse finding solely on the

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* Multilith opinion at page 11.

length of appellant's prison term, and the fact that it would preclude the establishment of a normal parental relationship. The trial judge stated, "The only thing that the court has got to consider is whether there is any reasonable probability that he will be released at some time soon enough to embark on a meaningful parental position in respect to Richard . . . ." (Emphasis added.) No evidence was received regarding the circumstances of the crime except appellant's statement that he took part in a bank robbery to obtain money to move his family to Florida. The court did not attempt to ascertain the probable length of appellant's prison term.[4/] (Cf. In re T.M.R., supra, 41 Cal.App.3d 694, 701-702.)

During the pendency of this appeal, the Legislature expressly deleted the length of a parent's confinement as a ground for termination of parental rights. (Stats. 1976, ch. 940, § 2, p. 2152.)

This court has held that repeal of a criminal statute without a saving clause requires abatement of pending proceedings against one charged under the former statute. (People v. Rossi (1976) 18 Cal.3d 295, 304.) Whether

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4/ Appellant stated that he had been sentenced under 18 U.S.C. section 4208(a)(2) (now section 4205(b)(2)). If so, he would be eligible for parole at any time at the discretion of the federal Parole Commission. Because he had not yet been permanently located within the prison system, no case worker was available to testify on this point.

the statute at issue here is sufficiently analogous to a criminal statute to require similar treatment need not be decided, since the issue was neither raised nor argued by the parties. In view of the other errors in this case, however, this court should hesitate to uphold an order terminating parental rights based solely on a ground which the Legislature no longer deems sufficient. I would reverse.

BIRD, C.J.

WE CONCUR:

TOBRINER, J.
NEWMAN J.

(Not for Publication)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In the Matter of RICHARD DAVID EZZELL, A Minor.	Civ. No. 48163 (Superior Court No. A9388)
LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS, Petitioner and Respondent, v. ROBERT EMERSON EZZELL, Citee and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester E. Olson, Judge. Reversed.

Appendix "A2"

Richard J. Stall, Jr., under appointment by the Court of Appeal, for Appellant.

John H. Larson, County Counsel, and Sterling R. Honea, Deputy County Counsel, for Respondent.

On 5 Feb 75, a "Petition for Freedom from Parental Custody and Control" was filed by the Los Angeles County Department of Adoptions, alleging that Richard D. Ezzell, aged 7 years and 4 months, should be declared free from the custody and control of his parents and that custody should be given to the Los Angeles County Department of Adoptions on the grounds that: (1) Richard had been left in the care of the Department of Public Social Services and others without provision for his support, without communication from his parents and with a continuous intent to abandon him, existing since September 1968. (2) The father, appellant herein, was alleged to have been convicted of a felony of a nature that made him unfit to have the custody of the minor and the sentence, imposed upon the father, was for such length of time as to deprive the minor of a normal home life.

The father apparently was served with a copy of the petition but the whereabouts of the minor's mother was unknown, although her name was said to be "Darlene Ezzell aka Diane Patten aka Diane Helen Diatte." She was served by publication. At the hearing, the trial court received into evidence the minor's birth certificate, the probation officer's report, which had been read and considered by the court, and Exhibit 2 (attached to the petition), which showed, in pertinent part, that the father had been found guilty of armed bank robbery and that appellant was to be imprisoned "for a period of ten (10) years as to count one; and for a period of ten (10) years as to count two; and for a period of twenty-five (25) years as to count three; and for a period of ten (10) years as to count four; that said sentence of imprisonment as to count two (2) shall run concurrently with count one (1); that said sentence of imprisonment as to count four (4) shall run concurrently with count three (3); and that said sentence as to count one (1) and count three (3) shall run consecutively." The County rested after these instruments were received and appellant thereafter presented witnesses.

The father appeals from the "judgment"[1] of the trial court, made under Civ. Code § 232, subd. (a)(4),[2] in favor of the petitioner and against the father.

First, appellant contends the trial court did

1/ We say "judgment" because, although the clerk's transcript contains an instrument so labeled, it does not show that any "judgment" was entered in a judgment book. We have reviewed the court file, pursuant to Rule 12(a), California Rules of Court, and have found that a judgment was, in fact, entered on September 18, 1975. We find that Code Civ. Proc. §§ 902, 904.1 appear to give the father a right of appeal.

2/ Civ. Code § 232 begins:

"(a) An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions:

"(1) Person abandoned by parents to care and custody of another; intent; support or communication with child . . . .

"(4) Whose parent or parents are convicted of a felony, if the felony of which such parent or parents were convicted is of such nature as to prove the unfitness of such parent or parents to have the future custody and control of the child, or if any term of sentence of such parent or parents is of such length that the child will be deprived of a normal home for a period of years."

Subdivision (a)(4) was amended effective January 1, 1977. (Stats. 1976, ch. 940, § 2.)

not comply with Civ. Code § 4600[3] as it did not make findings on issues which appellant raises.

In re B. G., 11 Cal.3d 679 (1974), held that Civ. Code § 4600 applies to all proceedings wherein the custody of a minor child is involved, including the juvenile court.

While the court here signed no findings of facts and conclusions of law, (none being requested; Code Civ. Proc. § 632), it did find in its discussion with counsel after the evidence was in, the following: "The Court does not have to conclude that Mr. Ezzell is going to be in jail for thirty-five years or even twenty-five years. The only thing that the Court has got to consider is whether there is any reasonable probability that he will be released at some time soon enough to embark upon

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3/ Civ. Code § 4600 reads in pertinent part:

"In any proceeding where there is at issue the custody of a minor child . . . .

"Before the court makes any order awarding custody to a person or persons other than a parent . . . it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. . . ."

a meaningful parental position in respect to Richard, and that probability is totally non-existant [sic], it really is. . . ."

As already indicated (see footnote 3), the court "shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. . . ." In re B. G., supra, 11 Cal.3d, states (pp. 698-699): "[S]ection 4600 permits the juvenile court to award custody to a nonparent against the claim of a parent only upon a clear showing that such award is essential to avert harm to the child. A finding that such an award will promote the 'best interests' or the 'welfare' of the child will not suffice." While Civ. Code § 232 (a)(4) provides for nearly automatic transfer of custody by conviction of a parent or parents of a felony as described, the subsection still requires proof of the "unfitness" of the parent to have future custody of the child or that the sentence shall be such a length of time "that the child will be deprived of a normal home for a period of years."

Thus, the trial court's statement is inadequate.

However, in its judgment the court stated the following: ". . . and the Court having found that an award of custody of Richard David Ezzell, minor, to said citees, or either of them, would be detrimental to said minor and that an award of custody to a non-parent is required to serve the best interests and welfare of said minor . . . ." While findings are required by Civ. Code § 4600, no particular form for such finding is therein specified and we know of no reason why findings and a judgment must be contained in separate documents. (Hopkins v. Warner, 109 Cal. 133, 139 [1895]; Guardianship of Sharp, 41 Cal. App.2d 79, 84 [1940]; In re Bensfield, 102 Cal.App. 445, 448 [1929].)

Nevertheless, the trial court's decision must be reversed because of that court's failure to appoint counsel for the minor child. (In re Dunlap, 62 Cal.App.3d 428 [1976].)

The following matters may appear on retrial, for which reason we consider them.

(1) The father contends that the report of the probation officer was not sufficient, claiming

that the report should include an in-depth interview with the father and the child in question as well as with others. There is no case so holding and appellant's reliance upon In re Melkonian, 152 Cal.App.2d 250 (1957) is misplaced.

(2) Next, the father contends that Civ. Code § 234 required that the child be before the court or that necessity be shown to relieve petitioner of a duty of compliance with Civ. Code § 234.[4/] However, section 234 has not been held to require that a minor person be present. In re Rodriguez, 34 Cal.App.3d 510 (1973), relied upon by appellant, does not so hold. Thus, the court stated (at p. 515): "Appellant asserts additionally that the trial court committed error in not requiring the presence of the children at the hearing to declare the children free from his custody and control. In view of our holding that failure to appoint counsel

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4/ Civ. Code § 234 reads:

"Upon the filing of such petition, a citation shall issue requiring any person having the custody or control of such minor person . . . to appear with such minor person at a time and place stated in the citation, except, if the minor is under the age of 12, upon order of the court after necessity being shown. . . ."

for appellant was error requiring a reversal and a new hearing, if the respondent so elects, we need not pass upon this issue." Accordingly, anything the court may have said regarding the point was dictum.

(3) Last, the father contends that section 232(a)(4) is unconstitutional, as violative of the equal protection clause of the federal Constitution. We disagree. (See: In re Eugene W., 29 Cal.App.3d 623, 627-630 [1972]; although this case deals with Civ. Code § 232(g) (now § 232(a)(6)), we believe its reasoning on the Constitution applies to Civ. Code § 232(a)(4).)

Additionally, appellant argues that section 232(a)(4) creates an irrebuttable presumption because it does not allow individual determination of whether parental control is detrimental or not. However, "[t]he interest sought to be protected is that of the welfare of a child," (In re Sherman M., 39 Cal.App.3d 40, 44 [1974]), and we disagree with appellant.

The judgment is reversed.

NOT FOR PUBLICATION

DUNN, J.

KINGSLEY, Acting P.J.

I concur in the reversal. In addition to the ground relied on in Justice Dunn's opinion, I would reverse on the additional ground that the findings, in the conclusionary form appearing in the record, do not meet the standard of particularity required by In Re Lawrence B. (1976) 61 Cal.App.3d 671.

KINGSLEY, Acting P.J.

JEFFERSON (Bernard), J. (Dissenting)

I dissent.

The majority takes the view that the trial court's order declaring the minor free from the parental custody and control of his natural parents must be reversed because of the mandate of In re Dunlap (1976) 62 Cal.App.3d 428 [133 Cal.Rptr. 310], that minors in a freedom-from-parental-custody-and-control proceeding must be represented by counsel. The majority holds that the record in the case at bench does not support the trial court's action in not appointing counsel for the minor as required by Dunlap.

I would affirm the judgment on two grounds. First, I do not agree with the Dunlap holding. Second, even if Dunlap were to be considered controlling, it should not be applied retroactively to reverse a judgment based on a trial that preceded the date of the Dunlap decision.

Dunlap deals with an interpretation of Civil Code section 237.5 which covers the question of the right of parents and a minor to counsel in a proceeding to declare a minor free from the custody and control of his parents. Section 237.5 provides, in relevant part, that

"[t]he judge shall ascertain whether the minor and his parents, have been informed of the right of the minor and his parents to be represented by counsel, and if not, the judge shall advise the minor and the parents, if present, of the right of each of them to have counsel present. The court may appoint counsel to represent the minor whether or not the minor is able to afford counsel. If any parent appears and is unable to afford counsel, the court shall appoint counsel to represent each parent who appears . . . ." (Emphasis added.)

Dunlap interprets section 237.5 as requiring the court to appoint counsel for the minor unless someone carries the burden of persuasion and establishes that the circumstances indicate that the minor's interests will be adequately represented without the appointment of independent counsel for the minor.

Dunlap, however, does not tell us upon whom the burden of persuasion (burden of proof) to establish the lack of need of the minor for independent counsel rests -- whether upon the trial judge, the minor's parents, or the petitioner instituting the action, whether a public agency or a person seeking to adopt the minor. Nor does Dunlap indicate whether the burden-of-proof

standard should be by a preponderance of the evidence or some lesser or greater degree of persuasion.

I do not see any legitimate basis for Dunlap's interpretation of section 237.5. If the Legislature had desired to make appointment of independent counsel for the minor mandatory in the absence of a showing to the contrary, it would have done so by clearer language than that found in section 237.5. This section simply gives the trial court a broad discretion -- by the use of the discretionary term "may" -- to appoint counsel for the minor. This seems especially cogent since section 237.5 makes it mandatory for the trial judge to appoint counsel for the parents who are indigent -- by using the mandatory term "shall." No such mandatory requirement for the appointment of independent counsel for a minor is set forth in the language of section 237.5, whether in case of a minor's indigency or a need otherwise for counsel in the minor's best interest.

If the burden-of-persuasion rule set forth in Dunlap is considered to be an appropriate interpretation of Civil Code section 237.5, it would seem to follow that a similar interpretation must be placed upon section 237 of the Civil Code. Section 237 provides: "In any proceeding to declare a minor person free from the custody

and control of his parents, the court may appoint some suitable party to act in behalf of such minor person and may order such further notice of the proceedings to be given as the court deems proper." (Emphasis added.) Dunlap, however, does not deal with section 237. If the discretionary authority conferred upon the trial judge by section 237.5 is to be interpreted as mandatory unless a burden of persuasion to the contrary is satisfied, the same result must follow under Civil Code section 237.

I do not think the Legislature intended any such result in either section 237 or 237.5 of the Civil Code. There are numerous instances in the law in which the trial court must exercise discretion. The conferring of discretion upon the trial judge does not require an interpretation that a ruling in a certain way shall be considered mandatory unless a burden of persuasion is satisfied that the discretion should be exercised differently.

It is my opinion that Civil Code section 237.5 should be interpreted only to require that the trial judge consciously consider whether the circumstances require the appointment of independent counsel for the minor. Whether a failure to appoint counsel would constitute an abuse of discretion may readily be determined by a review of the entire record on appeal. It seems to

me that a meaningful review of the trial court's action is the significant factor to be considered, and that this can be accomplished adequately if the record below shows that the trial court considered the question under section 237.5 of whether independent counsel should be appointed, and then did not appoint counsel. (Compare People v. Edwards (1976) 18 Cal.3d 796 [135 Cal.Rptr. 411], in which it was held that a trial judge's denial of probation as recommended by the probation officer need not be accompanied by a statement of reasons for not following the recommended probation.)

At any rate, I see no reason to apply Dunlap retroactively. It represents a distinct departure from previous law -- law that the trial court was entitled to rely upon in determining that it was not necessary to appoint separate counsel for a minor. As recently as 1973, in In re Helen J., 31 Cal.App.3d 238, 242 [107 Cal. Rptr. 106], it had been stated that "[t]he statute [Civil Code, § 237.5] does not compel the court to appoint counsel for the minors." In my view, even if Dunlap is to be followed, it is preferable to adopt the approach utilized in In re Rose G. (1976) 57 Cal.App.3d 406, 418 [129 Cal. Rptr. 338], and make a prospective ruling, so that the trial courts would have an opportunity to follow a new trend in the law in orderly fashion.

But even if we were to follow Dunlap and apply it retroactively, the record in the instant case establishes that the minor's father made a motion that an attorney be appointed to represent the father and also his children. In addition to the minor that is the subject of the proceeding herein, the father had three older children who were not involved. The trial judge made a finding that the father was indigent and appointed counsel for the father pursuant to Civil Code section 237.5. However, the trial judge did not appoint counsel for the minor who is the subject of the within proceeding.

I interpret the failure of the trial court to appoint an attorney for the minor as an appropriate exercise of its discretion and a determination that, under the circumstances presented, no useful purpose would be served by appointing separate counsel for the minor who was seven years of age. The record reflects that testimony was received from the three brothers of the minor -- the brothers being thirteen, fifteen and sixteen years of age, respectively. This testimony concerned the relationship between the father and the three older children who testified as well as the relationship between the father and the minor involved and the relationship between the minor and his three older brothers.

While the Dunlap court speaks of an appropriate factual basis for the juvenile court judge's exercise of discretion in not appointing counsel for the minor, it is difficult to ascertain exactly what type of factual information should be presented on the issue. In Dunlap, the court pointed out that it was not necessary for that court to "reach the issue of the nature of circumstances necessary to sustain the burden of establishing that counsel for the child need not be appointed in a proceeding to declare him free of parental custody and control." (Dunlap, supra, 62 Cal.App.3d 428, at p. 439.) (Emphasis added.) But Dunlap then gratuitously alluded to the matter by stating that factors such as the petition being filed by a public agency rather than a private person, or the fact that the child is already a ward of the court could well be considered significant factors tending to establish that the interests of the child are adequately represented without the necessity of independent counsel.

Whether there has been an abuse of discretion by the trial court's failure to appoint separate counsel for a minor should be decided on a case-by-case basis in light of the best interests and welfare of the minor -- without regard to any issue of burden of persuasion -- as long as the record reflects that the trial judge duly

considered the question of whether independent counsel for the minor should be appointed. The record so reflects in the case at bench. We are not dealing with a silent record on the issue. I find no abuse of discretion.

I would affirm the judgment.

JEFFERSON (Bernard), J.

(Not for Publication)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In the Matter of RICHARD DAVID EZZELL, A Minor.	Civ. No. 48163 (Superior Court No. A9388)
LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS, Petitioner and Respondent, v. ROBERT EMERSON EZZELL, Citee and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester E. Olson, Judge. Reversed, with directions.

Appendix "A3"

Richard J. Stall, Jr., under appointment by the Court of Appeal, for Appellant.

John H. Larson, County Counsel, and Sterling R. Honea, Deputy County Counsel, for Respondent.

On 5 Feb 75, a "Petition for Freedom from Parental Custody and Control" was filed by the Los Angeles County Department of Adoptions, alleging that Richard D. Ezzell, aged 7 years and 4 months, should be declared free from the custody and control of his parents and that custody should be given to the Los Angeles County Department of Adoptions on the grounds that: (1) Richard had been left in the care of the Department of Public Social Services and others without provision for his support, without communication from his parents and with a continuous intent to abandon him, existing since September 1968. (2) The father, appellant herein, was alleged to have been convicted of a felony of a nature that made him unfit to have the custody of the minor and the sentence, imposed upon the father, was for such length of time as to deprive the minor of a normal home life.

The father apparently was served with a copy of the petition but the whereabouts of the minor's mother was unknown, although her name was said to be "Darlene Ezzell aka Diane Patten aka Diane Helen Diatte." She was served by publication. At the hearing, the trial court received into evidence the minor's birth certificate, the probation officer's report, which had been read and considered by the court, and Exhibit 2 (attached to the petition), which showed, in pertinent part, that the father had been found guilty of armed bank robbery and that appellant was to be imprisoned "for a period of ten (10) years as to count one; and for a period of ten (10) years as to count two; and for a period of twenty-five (25) years as to count three; and for a period of ten (10) years as to count four; that said sentence of imprisonment as to count two (2) shall run concurrently with count one (1); that said sentence of imprisonment as to count four (4) shall run concurrently with count three (3); and that said sentence as to count one (1) and count three (3) shall run consecutively." The County rested after these instruments were received and appellant thereafter presented witnesses.

The father appeals from the "judgment"[1] of the trial court, made under Civ. Code § 232, subd. (a)(4),[2] in favor of the petitioner and against the father.

First, appellant contends the trial court did

1/ We say "judgment" because, although the clerk's transcript contains an instrument so labeled, it does not show that any "judgment" was entered in a judgment book. We have reviewed the court file, pursuant to Rule 12(a), California Rules of Court, and have found that a judgment was, in fact, entered on September 18, 1975. We find that Code Civ. Proc. §§ 902, 904.1 appear to give the father a right of appeal.

2/ Civ. Code § 232 begins:

"(a) An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions:

"(1) Person abandoned by parents to care and custody of another; intent; support or communication with child . . . .

"(4) Whose parent or parents are convicted of a felony, if the felony of which such parent or parents were convicted is of such nature as to prove the unfitness of such parent or parents to have the future custody and control of the child, or if any term of sentence of such parent or parents is of such length that the child will be deprived of a normal home for a period of years."

not comply with Civ. Code § 4600[3] as it did not make findings on issues which appellant raises.

In re B. G., 11 Cal.3d 679 (1974), held that Civ. Code § 4600 applies to all proceedings wherein the custody of a minor child is involved, including the juvenile court.

While the court here signed no findings of facts and conclusions of law, (none being requested; Code Civ. Proc. § 632), it did find in its discussion with counsel after the evidence was in, the following: "The Court does not have to conclude that Mr. Ezzell is going to be in jail for thirty-five years or even twenty-five years. The only thing that the Court has got to consider is whether there is any reasonable probability that he will be released at some time soon enough to embark upon

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3/ Civ. Code § 4600 reads in pertinent part:

"In any proceeding where there is at issue the custody of a minor child . . . .

"Before the court makes any order awarding custody to a person or persons other than a parent . . . it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. . . ."

a meaningful parental position in respect to Richard, and that probability is totally non-existant [sic], it really is. . . ."

As already indicated (see footnote 3), the court "shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. . . ." In re B. G., supra, 11 Cal.3d, states (pp. 698-699): "[S]ection 4600 permits the juvenile court to award custody to a nonparent against the claim of a parent only upon a clear showing that such award is essential to avert harm to the child. A finding that such an award will promote the 'best interests' or the 'welfare' of the child will not suffice." While Civ. Code § 232 (a)(4) provides for nearly automatic transfer of custody by conviction of a parent or parents of a felony as described, the subsection still requires proof of the "unfitness" of the parent to have future custody of the child or that the sentence shall be such a length of time "that the child will be deprived of a normal home for a period of years."

Thus, the finding of the trial court is

inadequate and the matter must be reversed in order to permit the trial court to make an appropriate finding. (See: In re B. G., supra, 11 Cal.3d at pp. 699-700.)

Next, the father contends that the report of the probation officer was not sufficient, claiming that the report should include an in-depth interview with the father and the child in question as well as with others. There is no case so holding and appellant's reliance upon In re Melkonian, 152 Cal.App.2d 250 (1957) is misplaced.

Next, the father contends that Civ. Code § 234 required that the child be before the court or that necessity be shown to relieve petitioner of a duty of compliance with Civ. Code § 234.[4/] However, section 234 has not been held to require that a minor person be

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4/ Civ. Code § 234 reads:

"Upon the filing of such petition, a citation shall issue requiring any person having the custody or control of such minor person . . . to appear with such minor person at a time and place stated in the citation, except, if the minor is under the age of 12, upon order of the court after necessity being shown. . . ."

present. In re Rodriguez, 34 Cal.App.3d 510 (1973), relied upon by appellant, does not so hold. Thus, the court stated (at p. 515): "Appellant asserts additionally that the trial court committed error in not requiring the presence of the children at the hearing to declare the children free from his custody and control. In view of our holding that failure to appoint counsel for appellant was error requiring a reversal and a new hearing, if the respondent so elects, we need not pass upon this issue." Accordingly, anything the court may have said regarding the point was dictum.

The father next contends he was denied his constitutional right to effective counsel, claiming that trial counsel "failed" in a number of respects. Apparently, private counsel was appointed for appellant, to be paid through the court. Accordingly, In re Rodriguez, supra, 34 Cal.App.3d at pp. 514-515, relied upon by appellant, would seem to be inapropos under such circumstance. Appellant's reliance on the alleged "failure" of his trial counsel is not well taken. "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been

handled more effectively. [Citations.] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (People v. Floyd, 1 Cal.3d 694, 709 [1970].)

Here, appellant states in his brief that counsel should have sought "the court's assistance in finding the whereabouts of the minor . . . ." However, the court ruled, appellant's attorney's questioning on that point was irrelevant when he called a witness under Evid. Code § 776; thus, appellant's attorney risked a contempt citation if he persisted. Regarding other alleged "failures" of his attorney People v. Floyd, supra, 1 Cal.3d, and other cases interpreting the Supreme Court ruling in People v. Ibarra, 60 Cal.2d 460 (1963) would seem to answer appellant's contentions.

Last, the father contends that section 232 (a)(4) is unconstitutional, as violative of the equal protection clause of the federal Constitution. We disagree. (See: In re Eugene W., 29 Cal.App.3d 623,

15 CR 736 (1972)

627-630 [1972]; although this case deals with Civ. Code § 232(g) (now § 232(a)(6)), we believe its reasoning on the Constitution applies to Civ. Code § 232(a)(4).)

Additionally, appellant argues that section 232(a)(4) creates an irrebuttable presumption because it does not allow individual determination of whether parental control is detrimental or not. However, "[t]he interest sought to be protected is that of the welfare of a child," (In re Sherman M., 39 Cal.App.3d 40, 44 [1974]), and we disagree with appellant.

The judgment is reversed so that the court may make a finding as indicated herein.

NOT FOR PUBLICATION

DUNN, J.

We concur:

KINGSLEY, Acting P.J.

JEFFERSON (Bernard), J.

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SUPREME COURT OF CALIFORNIA

In re RICHARD E., a minor LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS, Petitioner and Respondent, v. ROBERT E., Defendant and Appellant.	Supreme Court No. L.A. 30744 Super Ct. No. A9388 Notice of Appeal

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN, that Robert Emerson Ezzell, natural father and parent, citee and appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of this court entered on May 30, 1978, a Petition for Rehearing on which was denied by the California Supreme Court on June 29, 1978, together with judgment of the Los Angeles Superior Court herein entered September 10, 1975.

Appendix "A" - NOTICE OF APPEAL

this appeal is taken, pursuant to §1257 (1) and §1257 (2) of Title 28 of the United States Code.

DATED: August 18, 1978

RICHARD J. STALLY JR.
Attorney for Citee and Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, being first duly sworn, depose and say that I am and at all times herein mentioned was a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to the within action; that my business address is 2049 Century Park East, Suite 2460 Los Angeles, California 90067; that on the date of execution of this affidavit I served the within Notice of Appeal

on the parties in said action by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a mailbox regularly maintained by the Government of the United States at 2049 Century Park East, Los Angeles, California addressed as follows:

Honorable Lester E. Olsen, Los Angeles Superior Court, 111 North Hill Street, Los Angeles, California 90012

Clerk, Court of Appeal, Second Appellant District, 3580 Wilshire Boulevard, Room 301, Los Angeles, California 90010

John H. Larson, County Counsel, Lester J. Tolnai, Sterling R. Honea, Deputies County Counsel, 648 Hall of Administration, 500 West Temple Street, Los Angeles, California 90012

Executed this 18th day of August, 1978 at Los Angeles, California.

MELANIE MIKELS

SUBSCRIBED AND SWORN TO before me this 18th day of August, 1978

Notary Public in and for said County and State

OFFICIAL SEAL
RICHARD J. STALL, JR.
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires March 22, 1982